

Honorable Mary Alice Theiler

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PROPET USA, INC.,

Plaintiff,

v.

LLOYD SHUGART,

Defendant.

No. C06-0186 MAT

DECLARATION OF LLOYD  
SHUGART IN SUPPORT OF  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

I, Lloyd Shugart, declare as follows:

1. I am the Defendant in the above-captioned matter and have personal knowledge of and am competent to testify to the matters stated herein, unless indicated otherwise.

2. I am a professional photographer and conduct business under the name "Lloyd Shugart Photography – Studio 413. At all relevant times, I conduct my business as an independent contractor and agree to perform specific projects for clients and customers as an independent contractor.

3. On several dates between approximately 1999 through 2005 I was retained by Propet USA, Inc., Plaintiff in this action, to create photographs to be used by Propet in

1 various promotional materials. Pursuant to my usual practice, I created several sets of  
2 photographs that were subsequently delivered to Propet and used by Propet in promotional  
3 literature.

4 4. As is common with most if not all professional photographers, my practice is  
5 to retain all copyrights in the photographs and images I create. In return for my fee, I grant a  
6 limited license to use the images I create for a limited time and for a limited purpose. In all  
7 my dealings with Propet, I only granted Propet the ability to use my images for a limited time,  
8 namely two years, and for limited purposes. I never intended to, nor in fact ever did, transfer  
9 ownership of my copyrights to Propet.  
10

11 5. In all cases, I delivered my images to Propet along with a Film Delivery  
12 Memo, which sets forth my terms and which limits Propet's ability to use my images, and an  
13 invoice setting forth what I was owed. A true and correct copy of the Film Delivery Memo I  
14 delivered to Propet with each set of images is attached as Exhibit A.  
15

16 6. Attached as Exhibit B is a true and correct copy of a representative Invoice I  
17 would deliver with each set of images and Film Delivery Memo specifying the particular  
18 project to which the images relate and specifying the amount owed to me as a result of my  
19 services.  
20


21 7. The Film Delivery Memo and the Invoices are the only written instruments  
22 that I exchanged with Propet in the course of my providing services to them. I have never  
23 executed any form of assignment or other transfer of copyright rights in and to my images to  
24 Propet, nor was it ever my intent to provide Propet with ownership of the underlying  
25 copyrights in the images I provided.  
26  
27



1 8. I am the creator of all images that are the subject matter of this action. I have  
2 also applied for and have received copyright registrations on all images that are the subject  
3 matter of this action.

4 The foregoing statement is made under penalty of perjury under the laws the United  
5 States of America and is true and correct.

6 Executed this 5<sup>th</sup> day of February, 2007.

7  
8   
9  
10 Lloyd Shugart

## EXHIBIT A

# Lloyd Shugart Photography

## Studio 413

### Film Delivery Memo

**A. Definitions:** "Photographer" refers to Lloyd Shugart. "Client" refers to Propet USA, its representatives, successors, assigns, agents and affiliates.

**B. Payment:** FULL PAYMENT MUST BE RECEIVED BY PHOTOGRAPHER PRIOR TO PUBLICATION. ANY USE PRIOR TO PAYMENT SHALL BE CONSIDERED AN UNAUTHORIZED USE. Client agrees that reasonable and stipulated amount which shall be paid by Client to photographer for use prior to receipt of payment by Photographer shall be three (3) times Photographer's customary fee for such usage.

**C. Grant of Rights:** Grant of reproduction rights hereunder is conditioned upon Client's acceptance of each term set forth in this agreement, including but not limited to, receipt of payment in full by Photographer and placing of the required copyright notice on each use of Photographer's work. All rights not expressly licensed to Client in writing remain the exclusive property of Photographer. Duration of license is 2 years. Client use allowed is as per invoice, along with web use by client, and corporate collateral. There shall be no third party use or distribution without written approval of Photographer, any additional license granted is subject to all terms of this memo.

**D. Space Rates:** All usage is quoted as a minimum against space. Any additional space rate will be billed as such upon publication.

**E. Return of Photographs, Destruction of Digital files & Return of Media:** Client assumes all risk for all photographic material supplied by Photographer from time of receipt by Client to time of actual receipt of photographs by Photographer. Client agrees to return all such material in undamaged, unaltered and unretouched condition within thirty (30) days of receipt, or if a License is granted, within three (3) months of receipt by client or by first publication date, whichever is sooner, or such other period as is stated in writing herein. Client agrees to destroy all digital files within one week of reproduction. If the files were sent on digital media, all such material must be returned in undamaged condition within thirty (30) days of receipt.

**F. Film and Digital Media Holding Fees:** A holding fee of five dollars & fifty cents (\$5.50) per item per day shall be payable from the return date until time of receipt by Photographer unless otherwise indicated.

**G. Copyright Protection/Credit Line:** For Non-Editorial use, Client will provide copyright protection by placing proper copyright notice on any use. Proper notice shall be "© <<Year-date-of-job>> Lloyd Shugart" adjacent to or within the photograph(s).

**H. Indemnity:** Client hereby indemnifies and holds Photographer harmless against any and all liabilities, claims, and expenses, including reasonable attorney's fees, arising from Client's use of Photographer's work. Client assumes insurer's liability (a) to indemnify Photographer for all loss, damage, or misuse of any photographs: and (b) to return all photographs prepaid, fully insured, undamaged, by bonded messenger or overnight delivery service.

**I. Loss or Damage:** The parties acknowledge that it is difficult if not impossible to determine the exact value of each photograph subject to this agreement because of the duration of copyright protection and its present and potential value. Therefore, the parties have agreed that the reasonable value for loss or damage of each photograph is a sum no less than the amount indicated on the first page of this agreement. Client further acknowledges that its acceptance of this liquidated damage amount is a material consideration for photographer agreeing to deliver to Client the photographs subject to this agreement. In the event that Client infringes on Photographer's copyright in and to the works delivered herewith, then Photographer shall be entitled to obtain immediate injunctive relief to prevent further infringement and that Photographer shall not be required to post a bond to obtain injunctive relief, or if a bond is not waivable, such bond shall not exceed \$100.00. Photographer shall be entitled to recover the greater of Photographer's actual damages, or statutory damages in a sum not to exceed \$20,000.00 per infringement, in cases of non-willful infringement. In each instance, Photographer shall be entitled to recover reasonable attorneys' fees incurred and related costs in enforcing Photographer's rights under the United States Copyright Act, and under each federal or ancillary state law under which Photographer is awarded or granted damages.

**J. Alterations:** Client will not make or permit any alterations, additions, or subtractions in respect of the photographs, including without limitation any digitalization or synthesizing of the photographs, alone or with any other material, by use of computer or other electronic means or any other method or means now or hereafter known.

**K. Default:** In the event of non-payment or other breach of this Agreement by Client, Client shall pay all of Photographer's costs and expenses incurred in connection with enforcement of the terms of this agreement, including Photographer's reasonable attorney's fees.

**L. Releases:** Photographer is not responsible for obtaining model, property, or other releases in connection with any of the photographs licensed herein unless specifically stated herein.

**M. Copies:** Client shall provide to Photographer five (5) copies of each use of the photographs no later than the date of first publication.

**N. Miscellaneous:** Client may not assign or transfer this license. No alterations may be made in any of these provisions without the express written consent of the Photographer.

**O. Reshoots:** Client will be charged 100% fee and expenses for any reshoot required by Client. For any reshoot required because of an act of God or the fault of a third party, Photographer will charge no additional fee and Client will pay all expenses. If Photographer charges for special contingency insurance and is paid in full for the shoot, Client will not be charged for any expense covered by insurance. A list of exclusions from such insurance will be provided on request.

**P. Cancellations:** Cancellations and postponements: Client is responsible for payment of all expenses incurred up to the time of cancellation, plus 50% of Photographer's fee. If notice of cancellation is given less than two (2) business days before the shoot date, Client will be charged 100% fee. Weather postponements: Unless otherwise agreed, Client will be charged 100% fee if postponement is due to weather conditions on location and 50% fee if postponement occurs before departure to location.

**Q. Governing Law:** This agreement incorporates by reference Articles II and III of the Uniform Commercial Code now in existence, in the State of Washington, and the Copyright Act of 1976 as amended. This agreement shall be deemed to be a contract made under the laws of the United States of America and the State of Washington and for all purposes shall be interpreted in its entirety in accordance with these laws. Client specifically and irrevocably confers personal jurisdiction over it by the courts of the State of Washington or the United States District Court for the District of the State of Washington. Client specifically waives all rights to contest each court proceeding on the grounds of personal jurisdiction, venue and forum non-convenience. In the event of any award or judgement in favor of Photographer, or any settlement between Photographer and Client, arising from effecting and protecting Photographer's rights and benefits hereunder and/or any aspect of this agreement, Client shall pay all costs and expenses incurred by Photographer and/or Photographer's legal counsel related thereto, including, but not limited to, reasonable legal fees, arbitration and court costs, associated expenses, and legal interest on such award, judgement, or settlement.

FULL PAYMENT UPON DELIVERY OF FINAL FILM.

**R. Acceptance:** This agreement and its terms shall be deemed accepted by Client as acknowledged by written approval and/or the use of photographs provided by Photographer.

Make check payable to:  
Lloyd Shugart  
Studio 413  
55 So. Atlantic  
Seattle, WA. 98134

(206) 467-4299  
55 SO. ATLANTIC  
SEATTLE, WA. 98134  
[Studio413@qwest.net](mailto:Studio413@qwest.net)  
<http://www.studio413.com>

## **EXHIBIT B**

**Lloyd Shugart Photography****Studio 413**

55 So. Atlantic  
Seattle, WA. 98134

**Invoice**

DATE	INVOICE #
1/13/05	205110

**BILL TO**

Propét Shoes  
25612 74th Ave. So.  
Kent, WA. 98032

P.O. NO.	TERMS	IMAGE USE		
	Net 30	Feb. 05 Tradshow Posters		
ITEM	QUANTITY	DESCRIPTION	RATE	AMOUNT
203	1	Full Day Rate	2,000.00	2,000.00T
202	1	Half Day Rate	1,100.00	1,100.00T
305	50	Polaroid Film 4 X 5	6.99	349.50T
303	39	4 x 5 Film & Processing	6.99	272.61T
300	1	Green Seamless	39.13	39.13T
309	2	Pick up and Delivery	25.00	50.00T
Discount		Discount on Day Rate \$900.00 Please apply discount if paid by 02/13/2005	0.00	0.00
		Sales Tax	8.90%	339.20
			<b>Total</b>	<b>\$4,150.44</b>